IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 596

THE UNITED STATES OF AMERICA,
Plaintiff-Respondent,

vs.

FRED O. LOWE,
Defendant-Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI.

FRED O. LOWE prays that a writ of certiorari issue to review the judgment entered October 29, 1940, in the United States Circuit Court of Appeals for the Seventh Circuit in the above entitled cause.

Questions Presented.

1. Whether the court erred in affirming the judgment of the District Court, in denying the petitioner's several motions that the indictment be dismissed, for the reason that it appears upon the face of the indictment the court had and has no jurisdiction, and the indictment fails upon

its face to state a cause of action or a crime against the laws of the United States.

2. Whether each count of the indictment is fatally defective because the schemes and artifices therein alleged are not fraudulent at common law or by statute.

3. Whether each count of the indictment even if effectively stated the devising and carrying out by defendant of a fraudulent scheme, that scheme was on which, at no time from conception through consummation contemplated or required the use of the mails.

4. Whether each count of the indictment even if effectively stated the devising and carrying out by the defendant of a fraudulent scheme that the use of the mails described in the several counts had no connection with the schemes and was not for the purpose of executing the violation of any Federal Statute, or of any other statute, and the court had and has no jurisdiction.

5. Whether the scheme or artifice to defraud should be so fully stated as to enable the court to see, as a matter of law, that, if consummated, a fraud would be perpetrated.

6. Whether it is sufficient to particularize a fraudulent scheme merely with sufficient clarity to permit defendant to meet the proof of fraud and fraudulent intent, when the scheme is not the gist of the offense, or must the scheme be so particularized so clearly and definitely that if the defendant was convicted or acquitted, that he could not again be indicted for the same offense, by pleading the record of such conviction or acquittal, so that as a matter of law by reading the scheme as particularized, it can be determined.

7. Whether a court may read facts into the case.

8. Whether counts two and three of the indictment are basically the same as the scheme in count one.

Statute Involved.

Sec. 338, Title 18 U. S. C. A.:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place or cause to be placed, any letter, postal card, package, writing circular, pamphlet, or advertisement * * * in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States * * *."

Statement of Facts.

The defendant Fred O. Lowe was indicted for violation of Section 338, Title 18 U. S. C. A. August 4, 1938 and after a trial before a jury, the jury brought in a verdict of guilty on all counts of the indictment. He was thereupon sentenced by the court to two years upon each count, running concurrently, and to pay a fine of $1500.00 on each count, payment of the fine on the first count to satisfy the fines on the remaining counts. (R. 6 and 7.) That the court erred in assessing a fine of $1500.00 contrary to Section 1000 Title 18 U. S. C.

The indictment contained three counts—

The first count states—

Defendant caused a $4,000.00 check dated May 26, 1936 to be drawn to his order against the V. M. Lowe account, then knowing "there was insufficient credit in said account * * * to meet and pay said check" and "other checks theretofore outstanding and drawn upon said account." He deposited the check "to the credit" of his Chaseburg account the same day "well knowing at said time there were insufficient funds to meet and pay" in a Prairie City Bank.

The check was, on that day, mailed to First Wisconsin National Bank of Milwaukee "for the purpose of collection in the regular course of business." (R. 1 and 2.)

The second count states—

On May 27, 1936 defendant received from Prairie City Bank two money orders, one numbered 960 for $4,000.00, dated May 26, 1936; the other, number 961 for $2,000.00 was dated May 27, 1936; they were issued "without authority and without consideration and were worthless"; the same day, he deposited the orders "to his credit" in the Chaseburg State Bank, then and there knowing that the orders were without authority or consideration, and "were worthless"; on the same day, the money orders were mailed to First Wisconsin National Bank "for the purpose of collection in the regular course of business." (R. 2 and 3.)

The third count states—

The defendant delivered four checks to Prairie City Bank on May 23, 1936. Two of them, aggregating $2600.00 were drawn against his Chaseburg account; the remaining check, aggregating $8300.00 was drawn by one V. M. Lowe against his account at the Soldiers Grove station of the Peoples State Bank of Prairie du Chien, Wisconsin, payable to Prairie City Bank. There "were insufficient funds in the accounts" against which the checks were drawn to meet and pay them, to his knowledge. He received, on the same day, from Prairie City Bank $600.00 in cash, $4000.00 to the credit of V. M. Lowe account in that bank, and four money orders in the aggregate amount of $9500.00. (R. 3 and 4.)

All three counts containing the usual statutory allegation as to devising a scheme and artifice to defraud and for the purpose of executing said scheme cause to be placed a letter sent and delivered by the Post Office Establishment.

Defendant pleaded not guilty to all counts in the in-

dictment, the case come on for trial. After the jurors were sworn, defendant moved that the indictment be dismissed, which was denied. At the close of the Government's case, the motion was again made and again denied, and at the close of the entire case, the motion was once more made and denied. (R. 8.)

Judgment of conviction was appealed to the United States Circuit Court of Appeals for the Seventh Circuit. Judgment of District Court affirmed October 29, 1940. (R. 46.) See judgment of court in record.

Ruling of the Court Below.

The United States Circuit Court of Appeals for the Seventh Circuit affirmed the District Court on October 29, 1940. (R. 46.) See judgment of court in record.

Reasons for Granting the Petition.

1. There is a diversity of opinion between the United States Circuit Court of Appeals of the 10th Circuit, the United States Circuit Court of Appeals for the 3rd Circuit, and the United States Circuit Court of Appeals for the Seventh Circuit.

(a) That the case of *Dyhre* v. *Hudspeth*, 106 Fed. (2nd) 286 (Tenth Circuit) is not distinguished from the judgment of the United States Circuit Court of Appeals for the Seventh Circuit in this case (*The United States of America* v. *Fred O. Lowe*). The two cases are identical as to the proposition of whether mailing was independent of and after termination of the scheme.

(b) In the case of *Goodman* v. *United States*, 97 Fed. (2nd) 197 (3rd Circuit) forged checks were tendered and money and credits received. The scheme in the *Goodman* case contemplated activities on the part of defendant until the fraud was consummated. In this case as well as in the above cases, in the natural course of events, the mail would be used by the person who

extended the credit on the fraudulent checks of defendant.

(c) The scheme in the *Dyhre* case contemplated activity on the part of the defendant until the fraud was consummated. The scheme if any existed as a matter of law in the case at bar, contemplated activity on the part of the defendant and on the part of others only up to the deposit. In the *Dyhre* case a check was tendered without any bank account back of it. At bar, checks or money orders were tendered without sufficient funds or drawn without consideration or authority. In both cases the drawee was distant from the place where the goods or credit was obtained. In both cases, in the natural course of events, the mail would be used by the person who extended the credit. It is also clear that the supposed distinguishing factors as laid down in the case at bar are wholly irrelevant.

2. If the decision in the case at bar is correct, every check kiting case is a mail fraud case; a multiplicity of prosecutions under mail fraud statute will result; it is important to the administration of Justice and to the Public, and as a matter of expense to the Government, and of the jurisdiction as between false pretense prosecutions under state law as against federal prosecutions under mail fraud statutes. That it is important that this question be decided under these facts, that it is a mail fraud case.

3. Every indictment must with particularity state the offense so that defendant may prepare for his trial, and be able to plead the record of a conviction or acquittal thereunder as a defense if indicted again for the same offense, and the scheme or artifice to defraud must be so fully stated and show as a matter of law that if consummated a fraud would be perpetrated.

4. In construing the allegations of an indictment, the same must be strictly construed, and the court cannot under any circumstances read facts into the case where none exist.

5. From reading counts two and three of the indictment

it cannot be said that said counts are basically the same as that of count one in the indictment. All counts in the indictment come within the four corners of the *Dyhre* case. There is just as much reason to say, in the *Dyhre* case as at bar, that the person who tendered the document devised a scheme which, by reason of geographical distance between two points, in connection with ordinary business practices, contemplated use of the mails. If this is correct, there has been a wrong decision in either the *Dyhre case or at bar.*

6. That the court erred in assessing a fine of $1500.00 contrary to Section 1000 Title 18 U. S. C.

Conclusion.

For these reasons it is respectfully submitted that this petition should be granted.

FRED O. LOWE,
Petitioner.

F. E. WITHROW,
Attorney for Defendant-Petitioner.
P. O. Address:
310-11 Rivoli Building,
La Crosse, Wisconsin.

United States of America,
State of Wisconsin, } ss.
La Crosse County.

FRED O. LOWE being first duly sworn on oath says that he is the petitioner in the foregoing petition; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

FRED O. LOWE.

Subscribed and sworn to before me this 18th day of November, 1940.

MARIE A. WITHROW,
Notary Public,
La Crosse County,
Wisconsin.

(SEAL)

My commission expires October 10, 1942.

That hereto attached and made part hereof is defendant's brief supporting his petition herein.